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Blake A. Field VS Google, Inc., Doc. 13

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

BLAKE A. FIELD,

Plaintiff,

vs.

GOOGLE, INC., a corporation

Defendant.

Case No. CV-S-04-0413-RCJ-LRL

PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S COUNTERCLAIMS AND PORTIONS OF DEFENDANT'S ANSWER

Hearing Requested

COMES NOW Plaintiff Blake A. Field to file his Motion to Strike Defendant's Counterclaims and Portions of Defendant's Answer in the above entitled matter, in accordance with Rule 12(f) of the Federal Rules of Civil Procedure. This motion is based upon the attached Points and Authorities, all pleadings and papers on file herein, and any oral argument heard before the Court at the time of hearing.

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POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S COUNTERCLAIMS AND PORTIONS OF DEFENDANT'S ANSWER

I. INTRODUCTION

Federal Rule of Civil Procedure 12(f) governs motions to strike. According to its terms, a court may strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Fed. R. Civ. P. 12(f). It is upon this rule that the following arguments are made to strike in their entirety Defendant's Counterclaims and various portions of Defendant's Answer.

II. ARGUMENT

A. Certain denials that are made upon lack of information are improper and should be stricken, where the information is a matter of public record and easily discoverable.

The Federal Rules of Civil Procedure contemplate a Defendant making a denial on the basis of lack of information. Rule 8(b) provides, in pertinent part:

> If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial.

Such denials are subject to Rule 11(b), which provides:

> (b) Representations to Court.
>
> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> ...
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

"A party may not deny knowledge or information of a matter of public record or general public notice." Republic of Cape Verde v. A & A Partners, 89 F.R.D. 14, 23 (D.N.Y., 1980).

According to the court in Exchange Nat'l Bank of Chicago v. Brown:

> A denial based on lack of knowledge or information regarding matters of public record or general notice cannot be sustained because it cannot be said that the party denying the averment is without knowledge or information sufficient to form a belief as to the truth of such averment...Where the matter is one of common knowledge or one as to which the party can inform himself with the slightest effort, the party must perform a reasonable investigation to obtain the knowledge of such fact.

1985 U.S. Dist. LEXIS 16858 at 6 (Dist. N. Il. 1985) (citations omitted). See also Washington

Nat'l Trust Co. v. W.M. Dary Co., 568 P.2d 1069 (Ariz. 1977) (same standard applied to verbatim same state rule of procedure).

In this case, Plaintiff's First Amended Complaint contains the following averment:

> 7. Plaintiff is the sole owner of the registered copyrights in 51 original literary works ("the works"). Those registrations have an effective date of January 16, 2004. A listing of the works and their respective registration numbers is attached hereto as Exhibit A.

In answer to this averment, Defendant states:

> 7. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7, and on that basis denies the allegations therein.

Defendant's denial based on lack of knowledge or information is improper. Registered copyright ownership is a matter of public record. These records are on file with the Copyright Office. Moreover, obtaining those records could not be simpler – from any internet capable computer one may search for and acquire records from the Copyright Office website at www.copyright.gov. In fact, it takes less than a minute to obtain those records over the internet. Because Defendant failed to take any steps to acquire the information necessary to answer the averments in Paragraph 7 of the First Amended Complaint, that answer is not reasonably based on a lack of information and belief as required by Rule 11(b). Therefore, Defendant's answer to Paragraph 7 should be stricken and, further, the corresponding averments it purports to answer should be deemed admitted by the Court.

B. Certain answers make improper contrary factual averments that "dispute" averments in the First Amended Complaint, and should therefore be stricken.

With regard to the allowable substance of a Defendant's Answer, Rule 8(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied....

FRCP 8(b). Applying this rule, the court in Metropolitan Life Insurance Company v. Przybil found that portions of the defendant's answer, which disputed allegations of corresponding paragraphs of the complaint, did not meet the requirements of Rule 8(b). The court then struck those portions with leave to amend. Przybil, 2002 U.S. Dist. LEXIS 22756 at 3-4 (N.D. IL 2002).

In this case, Defendant's Answer puts forth factual averments to dispute a corresponding averment in the complaint. Paragraph 16 of Plaintiff's First Amended Complaint avers

> 16. Defendant does not seek authorization from copyright owners prior to reproducing and publicly distributing works stored in Google's cache.

In answer to Paragraph 16 of Plaintiff's First Amended Complaint, Defendant states:

> 16. In response to the allegations in Paragraph 16, **Google avers** that it has the authorization necessary, if any, to operate its system cache, but otherwise denies the allegations in Paragraph 16. (emphasis added).

Defendant's answer to Paragraph 16 exceeds the bounds of FRCP 8(b) in two ways. First, Defendant "avers" facts which are purportedly contrary to the allegations contained in Paragraph 16 of the First Amended Complaint. Contrary factual averments are not permitted in an Answer. FRCP 8(b), Przybil, supra.

Second, even if Defendant's improper averments are read as a denial, that denial does not fairly meet the substance of the averment to which it purports to answer. Defendant's statements in Paragraph 16 refute a totally separate and hypothetical averment, one that might be fairly characterized to read: "Defendant does not have authorization to operate the Google cache." Clearly, however, such was not the nature of the averment in Paragraph 16 of the First Amended Complaint. Therefore, even if the improper averments made in Defendant's Answer to Paragraph 16 are read as a denial, that denial does not meet the substance of the corresponding averment in violation of Rule 8(b). Because Defendant's Answer to Paragraph 16 does not comport with Rule 8(b), it should be stricken with leave to amend with a proper answer.

C. Defendant's counterclaims simply duplicate affirmative defenses. Therefore, they are redundant and should be stricken.

The issue of counterclaims that mirror affirmative defenses in copyright infringement actions has been previously addressed by courts in the Ninth Circuit. In Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 269 F.Supp. 2d 1213 (C.D. Cal. 2003), the defendant asserted the affirmative defense of copyright misuse. The defendant also counterclaimed for a declaration that Plaintiff's copyright was unenforceable due to Plaintiff's copyright misuse. Given the duplication, Plaintiff sought to dismiss Defendant's counterclaim as being redundant to Defendant's affirmative defense. The court found:

> The Declaratory Judgments Act is not intended to provide a forum for establishing the legal relations between declaratory defendants and "all the world." (citation omitted). Rather, the Act grants district courts the jurisdiction to "declare the legal rights and other legal relations of *any interested party*." 28 U.S.C. § 2201 (emphasis in original). Copyright misuse has already been asserted by [Defendant] as an affirmative defense, and the Court will reach all aspects of that issue if necessary. Separately litigating that defense in a declaratory posture would not serve the purposes of declaratory relief, such as clarifying and settling the legal relations of the *parties*, or affording a declaratory plaintiff relief from the "uncertainty, insecurity, and controversy giving rise to the proceeding." *Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984). Moreover...there are strong interests of judicial economy in avoiding needless duplication of these already elaborate proceedings. (citations omitted); (emphasis in original).
>
> Accordingly, [Defendant's] counterclaim for declaratory relief as to copyright misuse is dismissed with prejudice.

Grokster, 269 F.Supp. 2d at 1226-1227.

In this case, every counterclaim brought by Defendant repeats an affirmative defense asserted by Defendant. Google asserts the affirmative defense of fair use in its answer:

> **Third Affirmative Defense**
>
> 42. Plaintiff's claims are barred by the defense of fair use.

In its Counterclaim, Defendant duplicates this affirmative defense by praying for a declaratory judgment that Google's use of the Writings is a fair use:

> 33. Google is entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201 that the standard operation of Google's system cache with respect to the Writings is a fair use under copyright law.

Likewise, Defendant's Answer asserts the system caching safe harbor under the Digital Millennium Copyright Act as an affirmative defense:

> **Second Affirmative Defense**
>
> 41. Plaintiff's claims are barred by the statutory immunity for system caching granted to service providers under 17 U.S.C. § 512(b).

Defendant duplicates this affirmative defense with a counterclaim for a declaration that Google's system cache qualifies for one or more of the four statutory safe harbors under the Digital Millennium Copyright Act:

> 41. Google is entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201 that the Google system cache qualifies for one or more of the statutory safe harbors

provided by 17 U.S.C. § 512(a)–(d).

Finally, in its Answer, Defendant asserts the affirmative defense of implied license:

Fourth Affirmative Defense

43. Plaintiff's claims are barred by virtue of Plaintiff's implied license to Google.

As with the previous examples, Defendant duplicates this affirmative defense as a counterclaim:

> 37. Google is entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201 that Google has an implied license to include the Writings in its system cache and to permit the normal operation of its cache with respect to those Writings.

As in Grokster, here Defendant's counterclaims for declaratory relief simply mirror affirmative defenses previously asserted by Defendant. And, like in Grokster, this Court will reach all aspects of Defendant's affirmative defenses, if necessary. Further, as just as in Grokster,, separately litigating these affirmative defenses " would not serve the purposes of declaratory relief, such as clarifying and settling the legal relations of the *parties*, or affording a declaratory plaintiff relief from the 'uncertainty, insecurity, and controversy giving rise to the proceeding.'" 269 F.Supp. 2d at 1226.

Because Defendant's counterclaims simply mirror Defendant's affirmative defenses, they are by definition redundant and should be stricken per Rule 12(f). Beyond noncompliance with Rule 12(f), Defendant's counterclaims should be stricken because separately adjudicating these affirmative defenses in a declaratory relief action would not promote the purposes of the Declaratory Judgments Act and would hobble any notion of judicial economy applicable to these proceedings. Therefore, Defendant's counterclaims should be stricken, with prejudice, in their entirety.

D. Certain "affirmative defenses" posited by Defendant are not affirmative defenses at all and therefore should be stricken.

Eighth Affirmative Defense

47. Plaintiff's claims are barred because of his contributory fault.

First, the concept of contributory fault has never been honored in a copyright infringement action. Copyright infringement is a strict liability federal tort. Tellingly, no case has ever recognized contributory fault as a defense to copyright infringement. Second, even if the doctrine existed in copyright law, it would not be properly asserted as an affirmative defense. Claims of contributory fault go to causation, which makes allegations of contributory fault, in effect, a denial of cause. In Yash Raj Films (USA) Inc. v. Atlantic Video, a Defendant in a copyright action attempted to assert an affirmative defense of apportionment of fault. The court noted that "[u]nder federal law, affirmative defenses generally admit the matters in a complaint but nevertheless assert facts that would defeat recovery." Copy. L. Rep. (CCH) P28,806 (N.D. IL 2004) at 10. In striking the affirmative defense of apportionment of fault, the court found "Likewise...apportionment of fault is a denial and claim others are responsible....If the matter is put to issue by a denial, there is no need to insert a putative affirmative defense." Id.

As apportionment of fault is a denial and claim others are responsible, so too is comparative fault. Denials are not proper for affirmative defenses. Yash Raj Films. Therefore, pursuant to Rule 12(f), the Court should strike Defendant's Eighth Affirmative Defense with prejudice because it is, by definition, not an affirmative defense and is therefore insufficient.

E. Certain affirmative defenses posited by Defendant are legally impossible and should therefore be stricken.

Tenth Affirmative Defense

49. To the extent that Plaintiff suffered any damage or injury, which Google expressly denies, he failed to take the necessary steps to mitigate the damage or injury sustained.

In this case, Plaintiff has prayed for statutory damages. See First Amended Complaint at Page 6, Lines 5-6. Statutory damages are, by definition, set by statute. Because they are set by statute and are not related to any circumstance under the control of Plaintiff, they are, necessarily, impossible to mitigate. Therefore, pursuant to Rule 12(f), the Court should strike Defendant's Tenth Affirmative Defense with prejudice because it is, by definition, insufficient.

F. Every affirmative defense posited by Defendant is a barebones conclusory statement made without support whatsoever, and therefore they should be stricken.

The same pleading standard that governs complaints also governs affirmative defenses. That is, "affirmative defenses must give plaintiff 'fair notice' of the defense being advanced." Qarbon.com, Inc. v. eHelp Corp., 315 F. Supp. 2d 1046, 1049 (D. Cal., 2004) (citing Wyshak v. City Nat'l Bank, 607 F.2d 824, 826 (9th Cir. 1979). Defenses that fail to provide "fair notice" may be struck. Id. at 1048. In Qarbon, the Defendant's affirmative defenses -- without more --

asserted that Plaintiff's claims were barred by the doctrines of waiver, estoppel, and unclean hands. As to the estoppel claim, the court found

> [Defendant] does not specify what the defense is–whether it is asserting a single type of estoppel or several types of estoppel such as prosecution history estoppel, equitable estoppel, or some other type of estoppel. As such, [Defendant] does not provide fair notice of its affirmative defenses.

315 F. Supp. 2d at 1049. As to the other affirmative defenses, the court noted that mere reference to a doctrine is insufficient notice, and then held that "Because [Defendant] simply refers to the doctrines without setting forth the elements of its affirmative defenses, [Defendant] does not provide "fair notice" of its defenses." Id. The court also found that the affirmative defenses were inadequately pled because they were made without any factual support. Id. at 1050.

As in Qarbon, in this case Defendant has merely set forth a laundry list of affirmative defenses, stating neither elements thereof nor facts pertinent to any of those defenses. Like in Qarbon, Defendant merely states that "Defendant's claims are barred by estoppel." See Fifth Affirmative Defense in Defendant's Answer. In fact, Defendant sets forth each of its affirmative defenses in such a conclusory manner. Simply listing affirmative defenses by vaguely referring to doctrines and statutes does not give Plaintiff fair notice of those defenses being advanced. Qarbon. Because none of Defendant's Affirmative Defenses are properly pled, they all should be stricken without prejudice, subject to Defendant's ability to properly re-plead those defenses in an amended Answer.

G. Certain denials are improper and therefore should be stricken and deemed admitted.

In its Answer, Defendant denies, without qualification, Paragraph 26 of the First Amended Complaint, which reads:

> 26. Until it received notice of the original Complaint in this action, Defendant maintained exact copies of each of Plaintiff's works in the Google cache, despite clear notice of Plaintiff's copyright affixed to each of the works.

According to Defendant's unqualified denial of this averment, at no time prior to Defendant receiving notice of the original Complaint did any of Plaintiff's works exist in the Google cache. However, Defendant immediately contradicts itself in Paragraph 29 of its Answer: "Google admits that at least one of the Writings within its system cache has been accessed by an Internet user or users." At one turn, Plaintiff's works never existed in Google's cache. At the next turn, Plaintiff's works exist in the cache and are being reproduced and distributed therefrom. These notions are, at best, inconsistent and show that Defendant's denial was put forth in at least a reckless manner. Regardless, Defendant's admission in Paragraph 29 necessarily admits that Plaintiff's works existed in the cache. Therefore, Defendant's denial of Paragraph 26 should be stricken with prejudice and deemed admitted, but only to the extent its position with its answer to Paragraph 29 is inconsistent.

III.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court to grant this Motion to Strike Defendant's Counterclaims and Portions of Defendant's Answer and all relief prayed for therein.

DATED this 27th day of July, 2004.

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing MOTION TO STRIKE DEFENDANT'S COUNTERCLAIMS AND PORTIONS OF DEFENDANT'S ANSWER was served on July 27, 2004 by placing same in the United States mail, postage pre-paid to:

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